IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1962 OF 1979

ALONGWITH

SUIT NO. 362 OF 1980

SUIT NO. 1962 OF 1979

M/s. Vijay Silk Mills, a firm)
registered under the provisions of)
the Indian Partnership Act 9 of 1932)
carrying on business at 270/272)
Kalbadevi Road, Bombay 400 002.)..Plaintiffs

Versus

1. The United India Fire & General)
Insurance Company Limited,)
carrying on business at Universal)
Office Buildingm, 5th floor,)
Sir P.M. Road, Bombay 400 001.)

2. National Insurance Company)
Limited, carrying on business)
at Division No.IV, Indu House,)
N.Morarji Marg, Ballard Estate,)
Bombay 400 038.)

3. Central Bank of India, a Banking)

Co., incorporated under the)
provisions of the Banking Companies)
(Acquisition & Transfer of)
Undertakings) Act 1970 having)
its Head Office at Bombay Main)
Office, M.G.Road, Bombay 400 023.)..Defendants.

With

SUIT NO. 362 OF 1980

Messrs. Gwalior Stores, a firm)
carrying on business at 270/72,)
Kalbadevi Road, Bombay 400 002.)..Plaintiffs

Versus

1. The United India Fire &)
General Insurance Co. Ltd.,)
carrying on business at Universal)
Office Building, 5th floor,)
Sir P. Mehta Road, Bombay 400 001.)

2. Central Bank of India, having)
its Head Office at Bombay Main)
Office, Mahatma Gandhi Road,)
Bombay 400 023.)..Defendants

Mr. M.S.Singhavi, Senior Advocate, i/b. M/s. Gagrat & Co. for the Plaintiffs (in both matters).

Mr. A.G. Kothari for the Defendants (in both matters).

JUDGMENT RESERVED ON: 12.10.2006

JUDGMENT PRONOUNCED ON: 09.11.2006

ORAL JUDGMENT :

1. These Suits are filed for recovering Fire Insurance Claim from the Insurance Companies. I propose to dispose of both the suits by a common Judgment as the issues involved in both the suits are common, the parties are also common and the evidence recorded is also common.

. M/s. Vijay Silk Mills (Plaintiffs in Suit No.1962 of 1979) and M/s. Gwalior Stores (Plaintiffs in Suit No.362 of 1980) are the sister concerns. Both the sister concerns are carrying on business of Cloth Merchants & Commission Agents in Bombay. Both the concerns are partnership firms and they are duly registered under the provisions of the Indian Partnership Act.

. The United India Fire & General Insurance Company Ltd. is Defendant No.1 in both the suits. National Insurance Company is only the defendant No.2 in Suit No.1962 of 1979. Central Bank of India - defendant No.3 in the first suit and Defendant No.2 in the second

suit are the Bankers with whom the goods belonging to the sister concerns were hypothecated. These two sister concerns had taken the Fire Insurance Policies.

M/s. Vijay Silk Mills (Suit No.1962/1979)

(i) Under Policy of Insurance dated 16.12.1977 bearing No.203/01/1/21823, the goods belonging to M/s. Vijay Silk Mills were insurance against fire for a sum of Rs.3,00,000/-. The goods were their stock of Art Silk and/or Terelene Yarn and/or cloth stored and/or lying on the mezzanine floor and/or loft of the Plaintiffs shop bearing municipal No. 270/272,situate at the corner of Kalbadevi Road and Cavel Cross Lane, Kalbadevi, Bombay.This Policy was valid upto 17.10.1978.

(ii) By another Policy of Insurance dated 13.6.1977 bearing No.203/01/1/18937,the goods were further insured for a sum of Rs.1,00,000/-. Under these Policies, the goods that were covered were the stock of Art Silk and/or Silk and/or Terelene Cloth and/or other hazardous and/or non-hazardous goods including furniture, fixtures and fittings, which were lying on the mezzanine floor of the Plaintiffs' said shop premises bearing Municipal No.270/272. This Policy was valid upto 13.6.1978. Both these Police were of Defendant No.1 - The United India Fire & General Insurance Company Limited.

(iii) Under the third Policy of Insurance dated

19.12.1977 bearing No. 590/3107216 was for a sum of Rs.3,00,000/- and was valid for 12 months. This Policy was insured with the 2nd defendant i.e. National Insurance Company and the goods covered were stock-in-trade of piece goods of all kinds and other non-hazardous goods which were stored and lying in the shop premises as indicated above.

M/s. Gwalior Stores (Suit No. 362 of 1980)

(i) Under the Policy of Insurance dated 31.12.1976 bearing No. 203/01/1/14753 for a sum of Rs.1,50,000/-, the goods were insured against fire and the goods were stock-in-trade of piece goods of all kinds, such as terene, terrycot, artificial silk, woollen and/or cotton in cases and in bales and loose and other goods including furniture, fixtures, fittings, electrical installations etc. at the shop premises being Municipal No. 270/272.

(ii) Under another Policy of Insurance dated 8.3.1977 bearing No. 203/01/1/16608 for a sum of rs.4,00,000/- insured the goods against fire and the goods being the same as described above, lying and fitted at the same shop. Both these Policies were valid for one year i.e. first Policy upto 31st December, 1977 and the second being upto 7.3.1978.

(iii) Under a third Policy of Insurance bearing No.

203/01/1/17791 dated 18.4.1977 for Rs.1,00,000/- insured with the 1st Defendant the furniture, show-case, electrical installations, fans and.or air-conditions lying in the said shop premises.

2. On 17.12.1977 after 7 p.m., fire broke out in the loft of the Plaintiffs' aforesaid shop premises. Fire Brigade from the Dockyard and Memonwada Stations arrived at the scene and after great difficulty and effort, fire was brought under control, finally at 11 p.m. The Plaintiffs allege that fire was of great intensity. It is alleged in Suit No.1962 of 1979 that the property belonging to M/s. Vijay Silk Mills was destroyed in fire and those properties were Suitings worth Rs.40,000/- and Shirtings Rs.5,13,172.50. It is alleged by M/s. Gwalior Stores (Suit No.362 of 1980) that the loss caused by fire was to the extent of Rs.5,79,963.77 as under :-

(a)	Stocks of finished cloth,such as suitings and shirtings etc. kept in the loft of the value of	..Rs.2,84,639.51
(b)	Furniture, fixtures,fittings show-cases, electrical installations, etc. value of	..Rs. 53,794.00
(c)	Stocks of material lying on the ground floor of the said shop premises were spoiled and damaged by strong incessant and long flow of water mixed with burnt residue or remains of the fire which were washed down from the loft on to the ground floor, of the value of	..Rs.2,41,530.00
	Total	Rs.5,79,963.77

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3. It is further alleged by the Plaintiffs in both the suits that on 18.12.1977, the Plaintiffs communicated the fact of the aforesaid fire to Mr. Modi, the Regional Manager of the United India Fire & General Insurance Co. Ltd. Similarly, the fact of the damage having been caused in fire was communicated to National Insurance Company by a letter dated 20th December, 1977. Thereafter, the representatives of the two Insurance Companies had visited the site of fire and discussions were held with the Plaintiffs' partner. The surveyors of the Insurance Companies had requested the Plaintiffs to submit the claim forms as per the proforma. Accordingly, the Plaintiffs had submitted the statement of claim and other particulars as required by letter dated 23rd December, 1977. On 26th December, 1977, the 1st defendant sent to the Plaintiffs fresh claim forms which the Plaintiffs submitted to them giving details of the claim. by letter dated 4.2.1978, both the Plaintiffs set out in detail the facts regarding the said fire and furnished other details to both the defendants and requested both the Defendants to pay the compensation as per the terms of the respective Policies. However, both the defendants failed and neglected to pay to the Plaintiffs the loss claimed by them. Therefore, the Plaintiffs sent notice dated 9.7.1979 to both the defendants requiring them to pay the compensation as specified by them in the respective

claims submitted to both the Insurance Companies. Both the Insurance Companies, however, replied to the notice stating therein that they were advised to repudiate the Plaintiffs' claim. Therefore, the Plaintiffs filed the aforesaid suits for recovery of compensation in respect of the damage caused to the goods in fire.

4. Both the Insurance Companies being Defendants Nos. 1 and 2 in Suit No.1962 of 1979 have resisted the suit by their joint written statement dated 21.7.1981. The Suit No.362 of 1980 was duly resisted by Defendant No.1 United India Fire & General Insurance Co. Ltd. by their written statement dated 17.7.1981. The contentions raised by both the Insurance Companies in their respective written statement are common. Both the Insurance Companies have resisted the Plaintiffs' claim on the ground that the suits are not maintainable as being time-barred in view of Condition No.19 of the Conditions governing the Insurance Policies. They contend that as per Condition No.19 of the Insurance Policy, the suit for damages was required to be filed within 12 months from the happening of the loss or damage and both the suits are filed after a period of 12 months from the happening i.e. the fire which took place on 17th December, 1977.

5. They contend that the Suit No.1962 of 1979 was filed on 4.10.1979 and the second suit was filed on 10.3.1980. They further contend that all the benefits

of the Insurance Policies stood forfeited in view of Condition No.14 of the Insurance Policies as the claim that was put forth by the Plaintiffs were fraudulent being grossly exaggerated. They further contend that the entire stock of shirting material was not in the premises at the time of fire and the Plaintiffs relied only on copies of Bank statements of stocks which have been fraudulent. They further contend that the Plaintiffs had made false representation that the fire was intense and that it lasted for 3 hours from 8 p.m. to 11 p.m. when in fact the fire was mild and was put out by the fire brigade within 20 minutes of its arrival at the site. The entire episode of the fire lasted only for about 45 minutes. They further contend that the Plaintiffs could not produce their stock statement as on Kartik Sud 1, S.Y.2034 i.e. 12.11.1977. The Plaintiffs however, brought two statements of an inventory of suitings and shirtings purported to have been taken on 9.1.1977. They are having no description of material or brands thereof and they were also unsigned. They further contend that the Plaintiffs had informed the surveyors that all their invoices for the purchases made after Diwali 1977 were lying in the loft and they were burnt in the fire which took place on 17.12.1977. However, on 8.1.1978, the Plaintiffs' partner produced a file of invoices of purchases allegedly made after Diwali 1977 and the representation to the surveyors that those invoices were found on the ground floor. They cotend that these purchase invoices has not been seen at

the time of the joint inventory of the things lying on the ground floor which was burnt on 6.1.1978 for which the plaintiffs had no explanation. They contend that under these circumstances the plaintiffs had put forth a fraudulent claim.

6. The defendants further contended that the suit claim is misconceived, for want of compliance of condition No.11 and they also failed to furnish the records, documents and information for verification for the alleged loss. They contend that the plaintiffs failed to produce stock registers, bank's inspection report, invoices pertaining to the alleged purchases that were made between 1.12.1977 and 17.2.1977. They further contend that what the plaintiff submitted was only a summarised statement of purchases without any evidence in support thereof. They further contend that the Plaintiffs dishonestly withheld or suppressed the production of the aforesaid records and, therefore, the Plaintiffs are not entitled to any claim under the policies.

7. The defendants also contend that they are absolved of all liability under the policies on account of breach of warranty committed by the Plaintiffs. They contend that under the Warranty "H" of Form "A" which was a part of the policies no hazardous goods including cotton waste could be stored in the insured premises. However, at the time of the joint inventory of the

stocks in the loft taken on 27th December, 1977, pieces of loose cotton yarn waste smelling of alcohol or similar inflammable material were noticed in between the folds of cloth underneath the "takas" of shirting cloth. As such, in the presence of the Plaintiffs' partner, Dr. H.S.Mahal, a Consulting Forensic Scientist and the Superintendent of Bombay Fire Salvage Corps, had taken 21 samples of burnt-out material for chemical analysis and the report of the analysis indicates that presence of alcohol in 20 out of those samples.

8. On these contentions, they claim dismissal of the suit.

9. In view of these pleadings, issues were framed in the respective suits all of which common issues are indicated below against which I have recorded my findings for the reasons given below:-

	ISSUES	FINDINGS
1.	Whether Suit is not maintainable in view of Condition No.19 of the suit policy of insurance?	In the negative.
2.	Do defendants Nos. 1 & 2 prove fraudulent act being committed by the plaintiffs as detailed in paragraph 3 of the written statement ?	In the negative.
3.	If so, whether policy stood forfeited in view of Condition	In the negative.

	No.13 of the policy ?	
4.	Do defendants prove that plaintiffs had stored hazardous goods in the insured premises as stated in para 5 of the written statement ?	In the negative.
5.	Whether, thereby Condition No.11 is breached and the defendants are absolved from liability ?	In the negative
6.	Do plaintiffs (in Suit No.1962/79) prove to have suffered loss of Rs.5,07,506.84 with interest ?	Suit is partly decreed.
6.	Do plaintiff (in Suit No.362/80) prove to have suffered loss of Rs.3,94,917.51 with interest ?	Suit is partly decreed.
7.	Whether plaintiff-firm is not registered ?	In the negative.
8.	If so, what is its effect on the suit ?	Does not arise.
9.	To what reliefs plaintiffs are entitled ?	As per order.
10.	What decree or order ?	Suits are partly decreed.

ISSUE NO. 1 :

10. It is the contention of the defendants that in view of Condition No.19, the suit is not maintainable as the suit is not filed within 12 months from the date on which the fire occurred. Condition No. 19 reads as under :-

" In no case whatsoever shall the Company (i.e.

> the insurers) be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

It is undisputed that the fire broke out on 17.12.1977 and the suits are filed in 1979 and 1980 i.e. after the expiration of 12 months from the date of fire.

11. The learned Counsel for the defendants relied on a decision of the Apex Court in the case of National Insurance Co. Ltd. vs. Sujir Ganesh Nayak & Co. & Anr. reported in (1997) 4 SCC 366 for submitting that under the provisions of Section 28 of the Contract Act, such a condition does not become invalid. He, therefore, submits that the suit is not maintainable in view of condition No.19.

12. As against this, the learned Counsel for the plaintiffs submitted that the provisions of section 28 of the old Contract Act have been amended with effect from 8.1.1997 and by virtue of the amended provisions, the condition No.19 under the Policy has become void and, therefore, cannot be enforced. The Apex Court in the aforementioned case had considered the Condition No.19 of the Fire Insurance Policy in the light of the provisions of Section 28 of the old Contract Act. The view taken by the Apex Court was that the Condition

No.19 had the effect of extinguishing the right of the assured to make a claim when the suit was not filed within 12 months from the day when the loss or damage had occurred. In other words, the Apex Court held that there could be agreements which do not seek to curtail the time for enforcement of the right but which provide for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement and that such agreement would not fall within the mischief of Section 28 of the Contract Act.

13. However, the amended provisions of Section 28 of the Contract Act provides that agreements in restraint of legal proceedings void even where the agreements provide for extinguishing the right of any party to make a claim under the agreement. The relevant provisions of the amended Section 28 of the Contract Act are as under :-

> "28. Agreements in restraint of legal proceedings, void - [very agreement -
>
> (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
>
> (b) which extinguishes the rights of any party

thereto, or discharges any party thereto, from any liability, under or in respect of any party from enforcing his rights, is void to that extent]

Exception 1 - Saving of contract to refer to arbitration dispute that may arise - This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2 - Saving of contract to refer questions that have already arisen - Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or effect any provision of any law in force for the time being as to references to arbitration."

By virtue of clause (b) of Section 28, every agreement which extinguishes the right of any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any

party from enforcing his rights is void. Therefore, by virtue of the amended provisions, the Condition No.19 of the agreement will be void and, therefore, will not be enforceable. Therefore, the suit though filed after the expiry of the period of 12 months from the date of fire which occurred on 17.12.1977 would not become not maintainable in view of Condition No.19 of the Suit Policy for making a claim of compensation against the Insurance Company. This issue, therefore, shall have to be answered in the negative.

ISSUE NOS. 7 & 8 :

14. The Plaintiffs have produced the Certificate of Registration of the partnership firms of M/s. Vijay Silk Mills as also of M/s. Gwalior Stores (Exhibit "A" collectively). This evidence has not been challenged. Therefore, issue No.7 shall have to be answered in the negative and issue No.8 does not arise.

ISSUE NOS. 2 & 3 :

15. In para 3 of the Written Statement, it is contended by the Defendants that all the benefits under the Insurance Policies stood forfeited in view of Condition No.13 of the Policy. Condition No.13 reads as under :-

" If the claim be in any respect fraudulent, or

> if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy, ... all benefits under the policy shall stand forfeited."

Thus, in short, the contention is that the Plaintiffs made a fraudulent claim and also made a false declaration to obtain benefit under the policy. It was submitted on behalf of the defendants that the Plaintiffs' witness stated in his evidence that the fire which took place on 17.12.1977 continued for about three hours. The witness - Rajkumar Garg claimed to have been present when the fire broke out in the mezzanine floor of the shop. He stated that he was outside the shop and saw smoke coming out and there was explosion of A.C. glass panes. He also saw flames started coming out. Therefore, he immediately reported to the Fire Brigade station over phone. He further stated that within half an hour fire brigade staff came and the operation to extinguish the fire went on for two-three hours. The entire goods of Vijay Silk Mills and part of the goods of Gwalior Stores were destroyed. It is contended on behalf of the Plaintiffs that this statement was made to make a exaggerated claim. The Plaintiffs however, admitted in cross-examination that he arrived at the place of fire about 45 minutes after the fire broke out. This admission clearly indicates that the witness was

not present when the fire broke out. It is an admitted position that soon the police also arrived and drew a panchnama of the place of fire. The witness admits in cross-examination that the recording of panchnama by the police began only after the fire was extinguished. The panchnama is a part of Exhibit P-7. The correctness of this panchnama is not in dispute. The panchnama shows that it was started at 9.30 p.m. and concluded at 10.15 p.m. Exhibit "P-7" is annexed to the Fire Report prepared by the Chief Officer of the Mumbai Fire Brigade. This report shows that the time of fire was 8.20 p.m. and the fire was due to the electric short-circuit. The admission of the Plaintiffs' witness that drawing of panchnama began only after the fire was extinguished and the mention in the panchnama that the drawing of panchnama started at 9.30 p.m. It is clear that by 9.30 p.m. fire was completely extinguished. From the fire report, it is clear that the fire broke out at 8.20 p.m. Therefore, it could, at the most, be said that the fire went on between 8.20 p.m. and 9.30 p.m. i.e. for about an hour and not for three hours as claimed by the Plaintiffs' witness as alleged by the Plaintiffs in the plaints. It is vehemently submitted on behalf of the Plaintiffs that there was clear attempt on the part of the Plaintiffs when they stated that fire continued for about three hours. It was an intention to show that the damage caused by the fire was to a very large extent.

16. In addition to this, it is admitted by the Plaintiffs' witness that on his part it took about 5 - 6 days for assessing the damage caused by the fire and it is only thereafter that a declaration was made which is at Exhibit "P-6". Exhibit "P-6" is a claim statement wherein it is mentioned that the total value of the goods damaged in fire was Rs.5,80,000/- (Rs.5,25,000/- of the stock and Rs.55,000/- of furniture). The total value of the salvage was Rs.1,25,000/- (approx. 50% of Rs.2,41,530/- the value of the stock saved from the fire but damaged in the fire). The total claim on account of loss caused in fire was Rs.4,60,000/-. The witness however admitted that this statement of claim was incorrect. He further stated that it was only a preliminary claim and subsequently a final claim was made which is at Exhibit 62. He admits that the difference between the preliminary statement and the final statement was hardly Rs.3,000/- and that too on account of electric motors. The plaintiffs' witness further admitted that this claim statement was made only on the basis of memory as the record was damaged in fire. With regard to the record having been damaged in fire, the witness had admitted that entire record was not damaged. The witness has also made contradictory statements in his evidence as to what record was placed on mezzanine floor and what record was placed on the ground floor. At one stage, he admitted that stock record and books of accounts of M/s. Gwalior Stores and M/s. Vijay Silk Mills were kept on the loft partly. He

changed that version and further stated that all the stock of Vijay Silk Mills was only on the loft. The stock of Gwalior Stores was partly on the loft and partly on the ground floor. He also stated that records of Gwalior Stores was partly on the loft and partly on the ground floor., He also stated that books of accounts of Gwalior Stores were partly on the loft and partly on the ground floor. But he confirmed that all the stock, records and books of accounts of Vijay Silk Mills were kept only on the loft. In any case, it is an admitted position that no records ere ever produced before the surveyors in support of the statement of claim made by the Plaintiffs before the defendants' surveyors. What was produced before the surveyors was only the stock statements which admittedly were prepared on the basis of memory and not on the basis of any documents.

17. It is further admitted position that final books upto Diwali 1977 such as invoices, etc. were not available. Similarly, it is an admitted position that final books from Diwali 1977 onwards were not written and blank books from the cupboard in the loft in the shop were only shown to the surveyors. It is further admitted that purchase invoices and sale invoices that were available were only from Diwali 1977 - the date of fire. It was further admitted that the income-tax returns for the relevant period were not being submitted and that the statement of stock at the close of S.Y.2033 i.e. end of Diwali 1977 was not produced. All this

information was asked for by the surveyors by their letter dated 22.2.1978 (Exhibit P-16), but it was not produced as admittedly the same was not available has to be seen from the Plaintiffs' reply dated 20.2.1978 (Exhibit P-17).

18. Thus, the contention that is raised on behalf of the Defendants is that the declaration that was made by Exhibit P-6 and Exhibit P-62 was only on the basis of memory and that the declaration was also admittedly incorrect. It was further submitted on behalf of the defendants that the plaintiffs' witness had attempted to make exaggerated claim by further stating that the fire continued for about three hours with a view to show that extensive damage was caused in the fire. He, therefore, submitted that the Plaintiffs having made a false declaration in view of the Condition No.13, all the benefits available under the policies were provided.

19. As against this, the learned Counsel for the Plaintiffs submitted that indicating the period for which the fire continued i.e. for 3 hours may be a wrong statement of the plaintiffs' witness, but the same cannot be said to be fraudulent. He also further submitted that the claim that was made by Exhibit P-6 and Exhibit P-62 may be to some extent incorrect and it was obviously made on the basis of memory and not on the basis of record and the same cannot be said to be a fraudulent or false declaration so as to have the effect

of waiver of benefit that the Plaintiffs might get under Condition No.13 of the Policy.

20. In view of the facts and circumstances of this case, I do not think that the declaration that was made was a false declaration as obviously and admittedly it was made on the basis of memory. In Exhibit P-6 as well as Exhibit P-62, it has been clearly stated at the bottom that the claim statement was made on the basis of memory. If false declaration was intended to be made by the Plaintiffs, they would have created false documents in respect thereof, but that has not been done which show the Plaintiffs' bonafides.

21. Under these circumstances, I do not find that the Plaintiffs have made a fraudulent claim or false declaration so as to attract the provisions of Condition No.13. What is to be noted is that the defendants have not examined any witness in support of their contention raised in paragraph 3 of the written statement. Hence both these issues are answered in the negative.

ISSUE NOS. 4 & 5 :

22. The burden of proof that the Plaintiffs had stored hazardous goods in the insured premises was squarely on the defendants. The defendants have not led any evidence in that regard. In this regard, the learned Counsel for the defendants has relied on para 2 of the plaintiffs' letter dated 9.1.1978 which is part

of Exhibit P-7 to show that hazardous goods were stored in the insured premises. In para 2 of the said letter, it is mentioned as under :-

> "We do not store or trade in any waste, whether cotton or yarn. If you have seen some pieces of waste in the premises that might have been left by the painters, who painted our premises during last Diwali or it may be the pieces of yarn waste used by our Factory for tying the cloth bundles sent to our Shop premises."

This para was incorporated in this letter which was by way of reply to the surveyors' letter. It is true that in this paragraph, the presence of yarn waste in the premises was not disputed, but explanation is given in this regard. According to their contention, the cotton yarn which was found burning was smelling of alcohol. It is also contended in the written statement that 21 samples were taken and they were examined and 20 samples out of which were with alcohol. However, in this regard, there is no evidence led by the defendants. Therefore, it cannot be said that the defendants have proved that plaintiffs had stored hazardous goods in the insured premises and thereby committed breach of Condition No.11 of the Policy. Therefore, both these issues shall have to be answered in the negative. In this regard, it is also to be noted that in the reply to the plaintiffs' notice of claim, the defendants had

repudiated the plaintiffs' claim only on the ground of Condition No.13. The ground of repudiation to the plaintiffs' claim by virtue of Condition No.11 was also available to the defendants, but that was not resorted and therefore, the defendants have failed to prove that any hazardous goods were stored in breach of Condition No.11 of the Policy.

ISSUE NO. 6 (in Suit No. 1962/1979 concerning M/s. Vijay Silk Mills).

23. In this regard, the claim on behalf of M/s. Vijay Silk Mills is to the extent of Rs.5,07,506.84 ps. The details of this claim are given in Exhibit "C" to the plaint. Rs.4,00,000/0 being the amount under Policy No. 203/01/1/21823 and Policy No. 203/01/1/18937 dated 16.12.1977 and 13.6.1977 respectively and Rs.1,07,506.84 being the interest at the rate of 15% per annum from 17.12.1977 till 4.10.1979.

24. It is undisputed that the Plaintiffs have not produced any documentary evidence to show as to what was the stock of goods, viz. shirtings and suitings stored in the mezzanine floor of the suit shop. They have not produced any stock register nor have they produced any sale - purchase vouchers/bills. They have also not produced any account books in support of their claim. It is the claim of the plaintiffs that account books were lost in fire and that is the position accepted in

respect of some of the account books but not all. The plaintiffs' witness has stated that all the account books were not lost in fire. Even then it is not clarified by the plaintiffs as to what account books were in their possession. They have not produced the available account books.

25. The Plaintiffs have solely relied on the stock statements prepared by the plaintiffs on the basis of which the claim statement was furnished to the defendants' surveyors. It is further undisputed that although the defendants' surveyors had called upon the plaintiffs to produce the relevant documents and furnish to them the details of sale purchase upto the date of fire, no details or documents have been furnished to the surveyors.

26. All said and done, the fact remains that the fire had broken out and whatever goods were lying in the mezzanine floor of the shop and some material lying on the ground floor was damaged. The question would be as to what was the extent of material that was damaged in fire. Therefore, this is not a case where the claim of compensation on account of damage caused in fire was totally false and fabricated. The fire report clearly mentions that the cause of fire was due to short-circuit of electricity. The fire report has also clearly mentioned that large stock of finished cloth such as suitings and shirtings, cloth of various brands, office

furniture, electric fittings and fixtures, air-conditioning machine, office records and files, a wooden loft were severely damaged by fire, heat, smoke and water. The report also mentions that large stock of suitings and shirtings, cloth also was damaged by water. In the estimation of the Chief Officer of the Fire Brigade, as mentioned in the fire report, the estimate of loss was Rs.60,000/- with regard to the material and Rs.10,000/- with regard to the premises.

27. The only evidence that is available with the plaintiffs was stock statement prepared by the plaintiffs themselves. That stock statement which is part of Exhibit 10 and the final claim statement (Exhibit 62) indicates that both these claim statements were prepared on the basis of memory. The plaintiffs' witness admitted that this was prepared after 5 - 6 days. Both the statements seem to be dated 24.12.1977, the fire having broken out on 17.12.1977. It is clear that these statements were prepared after 6 - 7 days and that too only on memory. Both the statements are almost same, except the difference in value with regard to the electric motor. The stock statement attached to Exhibit P-10 is with regard to Vijay Silk Mills. It is mentioned at the top of the stock statement as "final statement of stocks stored and/or lying at the above premises account Vijay Silk Mils on 17.12.1977 at the place of fire" Under this, a statement has to be items, quality, quantity in metres, rate per metre and total

value is given. It pertains to shirtings and suitings of different quality and texture. The total value is Rs.5,33,172.50 ps. The claim statement at Exhibit 62 shows the value being Rs.5,69,800/-. Since these claims are prepared only on the basis of memory, they cannot be relied upon for the purpose of accepting the loss of the material during fire valuing the aforesaid amount. It is a matter of fact that the plaintiffs were maintaining account books. They were also filing income-tax returns. They were also maintaining sale-purhase vouchers, however, none was available.

28. The stock statement with regard to Vijay Silk Mills being part of Exhibit P-6 contains a certificate issued by the Chartered Accountant, viz. K.N.Mehta. It is dated 9.1.1978. It mentions that the Chartered Accountant verified the purchase bills of Vijay Silk Mills at the suit shop and certified that the purchases mentioned in the certificate were of yarn and cloth having been made by Vijay Silk Mills during each month of April to November 1977 and the total value thereof was Rs.3,59,129.56 ps. The same certificate also mentions the details as to the sales which the chartered accountant had verified from the sale register maintained by the plaintiffs. These sales were for the

period April 1977 to November 1977. The total sales were amounting to Rs.3,60,912.23 ps.This indicates that the amount of sales (Rs.3,60,912.23 ps.) was more than

the amount of purchases (Rs.3,59,129.56 ps.) at the end of November, 1977. There is no record available with regard to the material purchased and sold from 1.12.1977 till the date of fire i.e. 17.12.1977. This certificate, though not strictly proved by the plaintiffs but relied on by them, clearly indicates that as on 1.12.1977, the entire stock purchased between April 1977 and November 1977 was sold out between the same period. It is possible that besides the aforesaid figures that might have been stock at the beginning of April 1977. Even after considering the sales having taken place during the period 1.12.1977 to 17.12.77, some stocks of suitings and shirtings and other cloth material may have remained which came to be destroyed. However, there is absolutely no evidence to indicate as to what was the stock and what was the value thereof. The burden to prove this aspect was squarely on the plaintiffs. In this connection, some sketches are produced (Exhibit P-74) indicating various material lying on the loft, but this sketch will be of no avail to the plaintiffs to prove as to what was the material stock lying on the loft on 17.12.1977 which might have been destroyed in fire. From the statement prepared by the chartered accountant with regard to the purchase-sale of the material, it could be seen that the material which was sold to the same extent as the material was purchased. This indicates that balance of

stock of material that used to remain in the shop was quite less. Since there is no reliable evidence as to what material was lost in fire, then remains the matter to be estimated approximately. For that purpose, the fire report could be looked into which has estimated the loss of Rs.60,000/- only. But this could be said to be meagre estimation of the loss. In the absence of any supporting evidence, what has been mentioned in the stock statement cannot be accepted as it is under the aforesaid circumstances. As discussed above, there was also tendency on the part of the plaintiffs to exaggerate the event with obvious intention to show that the loss was to a great extent. Considering all these aspects, I feel that the amount which could be granted in favour of the plaintiffs on account of damage caused by fire could be reduced by 70% as claimed by them in the claim statement (Exhibit P-62). The claim that is made is inclusive of stock, electric motor, etc. being Rs.5,69,800/-, the amount would come to Rs.1,70,940/- (30%).

29. Thus, so far as Vijay Silk Mills is concerned, the amount of Rs.1,70,940/- should be decreed.

ISSUE NO. 6 (Suit No.362/1980 - M/s. Gwalior Stores)

30. The factual aspect is similar as stated above. For the same reasons, the claim statement at Exhibit P-6 in respect of Gwalior Stores cannot be relied upon. With regard to this aspect again there is a certificate issued by the chartered account which is dated 9.2.1979. The certificate indicates that chartered accountant had verified the statement of goods lost in fire and indicated that stock as per Bank statement as on 30.11.1977 was worth Rs.2,54,580/-. It further indicated the purchases from 1.12.1977 to 17.12.1977 were to the extent of Rs.330/-, totally Rs.2,54,910/-. The salvaged material lost of the value of Rs.93,494.43 ps. Deducting this amount, the amount of stock lost in fire comes to Rs.1,62,410.65. The statement further shows that the sales were to the extent of Rs.84,007.76 and the value of goods lost in fire is indicated at Rs.77,407.89 ps. This certificate further shows that the chartered accountant had checked the statement with sales and purchase bills for the period from 1.12.1977 to 17.2.1977 and stock statement submitted to the Bank as on 30.11.77. There is a Note beneath the statement which mentions that the chartered accountant had not been able to check sales bills prepared after 5.12.1977 as they were burnt in fire completely, but the sales for the remaining period was verified from the daily sales report available with the party,viz. the plaintiffs. This being the document produced by the plaintiffs themselves, it would show that the value of the goods lost in fire was only Rs.77,407.89 ps. he chartered

accountant had, in fact, verified the sales and purchase bills as also the stock as per Bank statement as on 30.11.77. Therefore, to my mind, this can be relied upon. This is also probable as the major stock of material belonging to the plaintiffs in this suit was lying on the ground floor. Therefore, not much damage to the material could have been caused due to fire. Therefore, the Plaintiffs can be granted an amount of rs.77,407.89 ps. on account of loss of material caused by fire.

31. Much was relied upon on behalf of the plaintiffs on Exhibit P-11 which is a letter written by the surveyors to Gwalior Stores. Therein mentioned the value of the salvaged material to be Rs.2,41,530/-. However, in the same letter, it is clearly mentioned that the plaintiffs had not agreed for quantifying the damage caused to the salvaged material to the extent of 35% of the said value. It is also further mentioned in the letter that the stock valuing at Rs.2,41,500/- yet to be verified. This letter can, at the most, be relied upon for the purpose of showing that the material that was salvaged was worth Rs.2,41,500/- and it was damaged due to water used by the Fire Brigade for extinguishing the fire. Therefore, I do not find difficulty in granting to the plaintiffs the amount equal to 35% of the value of the salvaged material which was damaged by water. That 35% would come to Rs.84,525/-. Thus, on account of damage caused to the material, the plaintiffs

would be entitled to Rs.1,61,932.89 ps.

32. There is also claim on account of damage caused to the air-conditioner, furniture, fixtures. Needless to say that the mezzanine floor and the shop was in common use of both the firms. Therefore, the furniture would be in one set and the amount that can be granted would be in one set only when the claim that is made on account of damage caused to the furniture and fixtures as estimated in the stock statement (Exhibit P-6) is Rs.56,000/-. There are in all 19 items indicated including air-conditioner, electric fittings and installations, wooden furniture, etc. I have considered all those figures and I do not think that claim would be unreasonable. Therefore, the amount of Rs.56,000/- can be granted to the plaintiffs on account of damage caused to the air-conditioner, furniture and electric fittings, etc. Since two policies were taken with United Fire & General Insurance Co. Ltd. as also National Insurance Co.Ltd., the amount of damage caused to the furniture and fittings, etc. could be divided equally between the two.

33. Thus, the Plaintiffs in Suit No.1962/1979 would be entitled to Rs.1,70,940/- on account of loss caused to the material and Rs.28,000/- on account of loss caused to the furniture and fittings which would be against defendant No.2 - National Insurance Co.Ltd.

34. In Suit NO.362 of 1980, the Plaintiffs would be entitled to Rs.1,61,932.89 ps. from the Defendant no.1 on account of loss caused to the cloth material and Rs.28,000/- on account of loss caused to the furniture and fixtures from the defendant no.1.

35. Hence, the order :-

O R D E R

Suit No.1962 of 1979

(i) The suit is partly decreed. The Defendant No.1 shall pay to the Plaintiffs Rs.1,70,940/- with interest thereon at the rate of 6% per annum from 17.12.1977 till the date of filing of the suit and from the date of filing of the suit till realisation of the full amount.

(ii) The Defendant No.2 shall pay to the Plaintiffs Rs.28,000/- with interest thereon at the rate of 6% per annum from 17.12.1977 till the date of filing of the suit and from the date of filing of the suit till realisation of the full amount.

Suit No. 362 of 1980

The Suit is partly decreed. The Defendant No.1 shall pay to the Plaintiffs Rs.1,89,932.89 ps.

(Rs.1,61,932.89 ps. + Rs.28,000/-) with interest thereon at the rate of 6% per annum from 17.12.1977 till the date of suit and from the date of suit till realisation of the full amount.

No order as to costs.

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(S.K.SHAH,J.)

(S.K.SHAH,J.)